Supreme Court, U.S.
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No. 92-1801

In The

Supreme Court of the United States

October Term, 1992

DIVERSIFIED FOODS, INC., and
NEW ENGLAND SALES, INC.,

Petitioners,

v.

THE FIRST NATIONAL BANK OF BOSTON, N.A.
and CASCO NORTHERN BANK, N.A.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Because the only question presented by the Petitioners for review is whether the federal court has exclusive jurisdiction over claims asserted under the Bank Holding Company Act, 12 U.S.C. §§ 1972 *et seq.* ("BHCA"), the only facts relevant to the petition are the following: (1) Petitioners asserted various state law claims in an action they pursued in the Maine state court; (2) while that state action was pending, Petitioners asserted a BHCA claim, based on the same facts, in federal court; (3) Respondents asserted claim-splitting as an affirmative defense to the federal action; (4) the state court granted summary judgment to Respondents on the merits in the state action; and (5) the federal court then granted summary judgment to Respondents based on principles of *res judicata*.

While Petitioners have included statements in their Statement of the Case that are not correct (*e.g.*, "Respondents acquiesced in permitting the claims to be pursued separately"), these statements are not material to the question presented by Petitioners for review. Therefore, Respondents will not detail these inaccuracies, beyond pointing to the recitation of the facts contained in the decisions of the District Court and First Circuit.

ARGUMENT

Since 1972, when Congress enacted the BHCA, only a handful of state and federal courts have been confronted with the argument that the Act bestows exclusive jurisdiction upon the federal courts. Consistent with this

Court's decision in *Tafflin v. Levitt*, 493 U.S. 455 (1990), which construed virtually identical statutory jurisdictional language contained in the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1964(c), and consistent with this Court's explanation in *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473 (1981) of the factors to be examined in determining whether the exception of exclusive jurisdiction has been bestowed in federal legislation, *all* of the lower courts which have decided this issue in published decisions have found BHCA jurisdiction to be concurrent. *Cuervo Resources, Inc. v. Claydesta National Bank*, 876 F.2d 436 (5th Cir. 1989); *Lane v. Central Bank of Alabama, N.A.*, 756 F.2d 814 (11th Cir. 1985); *United Central Bank of Des Moines, N.A. v. Kruse*, 439 N.W.2d 849 (Iowa 1989); *Waite v. Banctexas-Houston, N.A.*, 792 S.W.2d 538 (Tex. Ct. App. 1990). *See also Central Texas Hardware, Inc. v. First City, Texas-Bryan, N.A.*, 810 S.W.2d 234, 237-38 (Tex. Ct. App. 1991) (implicitly finding jurisdiction concurrent by ruling on a BHCA claim). *No* court has held to the contrary.

Hence, the decision of the First Circuit in the instant case is consistent with the decisions of other federal and state courts. See Rule 10(1)(a) of the Rules of the Supreme Court. Additionally, the First Circuit's decision does not conflict with any applicable decision of this Court. *Id.*, Rule 10(1)(c).

Finally, the issue presented by Petitioners here relates to the construction of one specific statute. Given the principles outlined by this Court previously in *Gulf Offshore* and *Tafflin*, the examination of whether jurisdiction is exclusive or concurrent is statute-specific; therefore, the resolution of this issue as to the BHCA would not

resolve any other, broader question relating to other statutes. The jurisdictional question as to the BHCA has, as indicated above, only arisen infrequently in the twenty years the law has been in existence. Hence, the question presented by Petitioners is neither "special" nor "important," as those terms are used in Rule 10.1 of the Rules of the Supreme Court. *See Rice v. Sioux City Memorial Park Cemetary, Inc.*, 349 U.S. 70, 74 (1955) ("special and important" means beyond "the academic or episodic").

Not only does the question presented by Petitioners fail the test for grant of certiorari set forth in Rule 10, but the specific arguments upon which Petitioners base their claim of exclusive jurisdiction have been previously rejected by this Court.

Petitioners focus on two arguments: the "antitrust" type language of the BHCA and the legislative history of the Act. This Court previously rejected a similar antitrust analogy argument in *Tafflin*,[1] and the legislative history upon which Petitioners' argument is based (two Senators' references to "district" or "federal" court), has also been found insufficient to reflect a bestowal of exclusive jurisdiction in parallel situations. *See Gulf Offshore*, 453 U.S. at 479-83 (such a reference, even by a majority of senators in the form of the language of the statute, does not divest

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[1] The RICO statute construed by the Court in *Tafflin* was enacted in the same session of the same Congress as the BHCA. (RICO was passed on October 15, 1970, Pub.L. 91-452, 84 Stat. 841; the BHCA was passed on December 31, 1970, Pub.L. 91-60, 84 Stat. 1766.) The jurisdictional language of the RICO statute examined in *Tafflin* is practically identical to the parallel language in the BHCA. Compare the BHCA, 12 U.S.C.A. § 1975, with RICO, 18 U.S.C. § 1964(c).

state courts of jurisdiction); *Dowd Box Co. v. Courtney*, 368 U.S. 502, 512-13 (1962) (Senator's reference to giving employers the right to sue in federal court did not indicate exclusive jursdiction under Section 301(a) of LMRA, 29 U.S.C. § 485(a)).[2]

CONCLUSION

For the reasons stated above, and on the basis of the further discussion of the facts and case law set forth in the opinions of both Courts below, the Petition should be denied.

Respectfully submitted,

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[2] The Eleventh Circuit reviewed the legislative history of the BHCA and concluded that it revealed "no 'unmistakable implication' that Congress intended to confine jurisdiction to the federal courts," *Lane*, 756 F.2d at 817-18, as required under the test for exclusive jurisdiction consistently announced and followed by this Court.